

**EP DETERMINATIONS
QUALITY ASSURANCE
BULLETIN**

FY-2004 No. 5

Date: July 6, 2004

Code sections which may be incorporated by reference

Incorporation by reference of the Code and Regulations is not permitted unless specifically authorized by the Code, Regulations or other authority. See Announcement 75-110, 1975-43 I.R.B. 20, October 28, 1975, based on Treasury Information Releases 1334, Q&A M-1, and 1403, dated January 8, 1975 and September 17, 1975 respectively.

If there is a choice to be made, (for example, there are three different definitions of compensation under IRC 415(c)(3) and a plan can use either the current or past year testing method under IRC 401(k)) that portion of the section may not be incorporated by reference, as it would lead either to a non-determinable accrual or benefit, or to an impermissible use of discretion.

Quality Assurance Bulletin FY 2001 No. 1 was updated and the updates are underlined.

PERMITTED SECTIONS

(some or all incorporation by
reference allowed)

AUTHORITY

401(a)(9) – Notwithstanding any other provision of law, except as provided in the Regulations, a plan may incorporate by reference the requirements of section 401(a)(9).

However, Regulation sec. 1.401(a)(9)-1, A-3, states that, “In order to satisfy section 401(a)(9), the plan must include the provisions described in this paragraph reflecting sec. 401(a)(9).

First, the plan must generally set forth the statutory rules of section 401(a)(9), including the incidental death benefit requirement in sec. 401(a)(9)(G).

Second, the plan must provide that distributions will be made in accordance with this section and secs. 1.401(a)(9)-2 through 1.401(a)(9)-9. The plan document must also provide that the provisions reflecting sec. 401(a)(9) override any distribution options in the plan inconsistent with section

P.L. 99-514, § 1121(d)(3)-(5), as amended by P.L. 100-647, § 1011A(a)(3)-(4), Regulation §. 1.401(a)(9)-1, A-3, and

Regulation sec. 1.401(a)(9)-2 through -5, and -7 through -9, effective 1/1/2003, and sec. 1.401(a)(9)-6, effective 6/15/2003, retroactive to 1/1/2003, Notice 2003-2, 2003-2 I.R.B. 257 (January 13, 2003).

Notice 97-75, 1997-51 I.R.B. 18, 1997-2 C.B. 337 (December 22, 1997)

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| <u>401(a)(9). The plan also must include any other provisions reflecting sec. 401(a)(9) that are prescribed by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin.</u> | |
| <u>401(a)(17)- Governmental Plans – annual compensation limits</u> | <u>Regulation § 1.401(a)(17)-1(d)(4)(ii)(C)</u> |
| <u>401(a)(17)(B) – Cost of Living Increases</u> | <u>Regulation § 1.401(a)(17)-1(a)(3)</u> |
| <p>401(k)(3), 1.401(k)-1(b) – ADP test generally may be incorporated by reference. However, the plan must specify:</p> <ol style="list-style-type: none"> 1. current or prior year testing method; 2. if using prior year, whether first year NHCE ADP is 3% or actual ADP; 3. subsequent IRS guidance is incorporated by reference; 4. if aggregating or disaggregating plans or using the rule in 401(k)(3)(F), define which participants are included in ADP test(s); and 5. definition of compensation must be in the plan | Regulation. § 1.401(k)-1(b)(2)(iii), and Notice 98-1, § IX, <u>1998-3 I.R.B. 42, (January 20, 1998)</u> |
| 1.401(k)-1(b) - coverage and nondiscrimination requirements generally may be incorporated by reference but if a plan is using safe harbor provisions certain language is required. | Regulation. § 1.401(k)-1(b)(2)(iii), Notice 98-52, § XI, <u>1998-46 I.R.B. 16, 23, 1998-2 C.B. 634 (November 16, 1998)</u> and modified by <u>Notice 2000-4, 2000-4 I.R.B. 413, 2000- 1 C.B. 413, (Jan. 24, 2000)</u> |
| <p>1.401(m)-1(b) - QNECs and/or elective contributions may be used as matching and plan aggregation rules. May be incorporated by reference to some extent</p> <p>401(m)(2), 1.401(m)-1(b) - ACP test - must specify <u>current year or prior year</u> testing method and incorporate subsequent guidance (make same changes for ACP as above for 401(k)(3).)</p> | Regulation. § 1.401(m)-1(b)(2), and Notice 98-1, <u>1998-3 I.R.B. 42, (January 20, 1998)</u> |

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| 401(m)(9) - Multiple use rules | <u>(The multiple use test was repealed for years beginning after December 31, 2001.)</u> |
| <u>402(g)</u> - <u>Annual limit- Indexed</u> | <u>Regulation §1.401(a)-30(a), and Announcement 93-105, § II.C, 1993-27 I.R.B. 15, (August 16, 1993)</u> |
| 410(a)(3), 411(a)(5), DOL Regulation § 2530.200b-2(b) & (c) <u>The definition of hours of service must be in the plan document, but the rules for determining hours of service for reasons other than the performance of duties and crediting hours of service to computation periods may be incorporated</u> | DOL Regulation § 2530.200b-2(f) |
| 414(p) – QDRO | Regulation. § 1.401(a)-13(g) |
| 414(u) - USERRA | P.L. 103-353 (USERRA), P.L. 104-188 (SBJPA), sec. 1704(n) Revenue Procedure 96-49, 1996-43 I.R.B. 74, (Oct. 21, 1996) |
| 415- Limitations may be incorporated. <u>Plan provisions must preclude the possibility that the limit under 415 will be exceeded.</u> However, the plan must include the following: 415(b) - how adjustments are made if two or more DB plans 415(c) - how adjustments are made if two or more DC plans <u>415(c)(3)</u> – <u>must specify exactly which definition of compensation is being used; (this can be done by citing one of the definitions under Reg. § 1.415-2(d), as long as the plan also provides that elective amounts specified in 415(c)(3)(D) are included in the plan's 415 compensation definition for limitation years beginning after Dec 31, 1997.</u> | Notice 87-21, Q&A-11, 1987-6 I.R.B. 20, 1987-1 C.B. 458, (Feb. 9, 1987) and Regulation § 1.415-1(d) <u>P.L. 107-16 (EGTRRA), § 611(i)(3) as added by</u> <u>P.L. 107-147 (JCWA), § 411(j)(3), “(3) Special Rule.”</u> Announcement 95-99, 1995-47 I.R.B. 10, (November 27, 1995) |

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| <p>1.415-6(b)(6) - method used to establish suspense account to correct excess annual additions</p> | |
| <p>416 - If the employer has only one plan, a single benefit structure that will always satisfy 416, <u>and vesting that always satisfies 416</u>, then no 416 language is required.</p> <p>416(i) – Criteria for determining key employee and non-key employee, but the definition of compensation must be specified in the plan.</p> <p>416(g) –description of how the top-heavy ratio is computed may be incorporated by reference.</p> | <p>Regulation § 1.416-1, Q&A T-36(a) & (c)</p> <p>Regulation § 1.416-1, Q&A T-36(b)</p> <p>Regulation § 1.416-1, Q&A T-36(b)</p> |
| <p><u>Applicable Mortality for Purposes of 417(e) and 415(b) - Plans may incorporate this table by reference to Rev. Rul. 2001-62.</u></p> | <p><u>Revenue Ruling 2001-62, 2001-53 I.R.B. 632, (December 31, 2001)</u></p> |